UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

COMMERCIAL LOGISTICS CORPORATION,	)	
Plaintiff,	)	
vs.	)	NO. 4:04-cv-00074-SEB-WGH
ACF INDUSTRIES, INC.,	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

COMMERCIAL LOGISTICS CORPORATION, Plaintiff,	)	
	)	4:04-cv-00074-SEB-WGH
vs.	)	
ACF INDUSTRIES, INC., Defendant.	)	

ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant's, American Car and Foundry Industries, Inc. ("ACF"), Motion for Summary Judgment filed pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1(a). Plaintiff, Commercial Logistics Corporation ("CLC"), has brought a claim under the Indiana Environmental Legal Action Statute (the "ELA"), Ind. Code § 13-30-9-1 *et seq*, seeking compensation for the substantial costs it incurred and will continue to incur in evaluating, removing, and remediating the alleged petroleum contamination of its real estate located at 400 Missouri Avenue, Jeffersonville, Indiana ("the property"), property previously owned by ACF from 1899 to 1955. Defendant urges summary judgment on the grounds that suit is barred by the applicable six-year statute of limitations which began to run when CLC discovered the contamination. In response, Plaintiff argues that the suit is timely either under the state ten-year statute of limitations or, in the alternative, based on the effective date of the ELA. As explained below, the Court GRANTS Defendant's Motion for Summary Judgment.

Statement of Material Facts

CLC, an Indiana corporation, alleges that ACF, a Delaware Limited Liability

Corporation, contaminated the subject real property during the period of time it was owned by ACF. In 1899, Ohio Falls, the then-owner of the property, and twelve other railroad equipment manufacturers had merged to form ACF. Compl. ¶¶ 4-5. Prior to leasing the property in 1951, ACF used Bunker C oil, a popular residual fuel oil, to fire boilers for its railroad equipment manufacturing business. The fuel was pumped into an underground storage vault located in the southeast corner of the property for retention before it was carried through pipes to the north part of the property for use. Id. ¶ 9. CLC alleges that leaks in the pipes, in conjunction with ACF's customs and practices, caused Bunker C oil to be released into the ground. Id. ¶ 10.

Between 1951 and 1955, Jeff-Clark Corporation, Falls Cities Transfer and Storage Company ("Falls Cities"), and U.S. Steel Homes purchased the property from ACF in three separate transactions. Id. ¶ 7. In 1972, CLC purchased the southern portion of the property from Jeff-Clark Corporation and, in 1975, purchased the remaining northern portion from Falls Cities and U.S. Steel Homes. Id. ¶ 8. The parties agree that CLC first learned of the alleged Bunker C contamination at the property in 1994 from a soil quality assessment it had commissioned. Def.'s Mem. Supp. at 3; Pl.'s Resp. Br. at 2.

CLC filed this complaint on February 27, 2004, in Clark County Superior Court, seeking to recover compensation for the substantial costs it incurred and will continue to incur in evaluating, removing, and remediating the alleged petroleum contamination of the property. The case was removed from state court on March 29, 2004, to this court on the basis of diversity jurisdiction. See 28 U.S.C. § 1332.

Legal Analysis

I. Summary Judgment Standard

"Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Westra v. Credit Control of Pinellas, 409 F.3d 825, 827 (7th Cir. 2005) (quoting Rule 56(c) of the *Federal Rules of Civil Procedure*).[1] A genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the particular issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Bellaver v. Quanex Corp., 200 F.3d 485, 492 (7th Cir. 2000) (citation omitted). The court must "construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. Liberty Lobby, Inc., 477 U.S. at 255; Del Raso v. U.S., 244 F.3d 567, 570 (7th Cir. 2001). However, the nonmovant "may not simply rest on his pleadings, but must demonstrate by specific evidence that there is a genuine issue of triable fact." Colip v. Clare, 26 F.3d 712, 714 (7th Cir. 1994) (citation omitted).

II. Statute of Limitations

The single, dispositive issue raised in ACF's Motion for Summary Judgment is whether CLC's complaint, brought under the ELA, is time-barred, having been filed beyond the applicable statute of limitations. The ELA contains no explicit statute of limitations. Thus, ACF argues that the February 27, 2004, complaint is subject to the six-year "damage to other than personal property" statute of limitations, Ind. Code § 34-11-2-7 ("property SOL"), or,

[1] This motion was not pled as a 12(b)(6) motion to dismiss because the complaint did not state the date the contamination was discovered. Discovery was conducted to determine this date among other material facts. ACF's 12(b)(6) motion to dismiss, which was denied, dealt with whether the ELA applies retroactively.

alternatively, to the six-year statute of limitations contained in the Federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). ACF maintains further that the ELA statute of limitations accrues according to the discovery rule,[2] making the filing of this case untimely by at least four years.

CLC rejoins that the complaint is timely because, rather than a six-year limitations period, the ten-year general statute of limitations ("general SOL"), Ind. Code § 34-11-1-2, applies here, and, even if a six-year statute of limitations is deemed to apply, it could not have accrued prior to the effective date of the ELA in 1998. Thus, in determining whether CLC's cause of action is time-barred, our analysis must explore and resolve two subsidiary issues: A) what is the applicable statute of limitations; and B) when does the statute of limitations accrue?

A. Claims under the ELA are Subject to a Six-Year Statute of Limitations.

The ELA was enacted by the Indiana General Assembly on May 13, 1997, and became effective on February 28, 1998. Public Law No. 59-1997. Section 2 of the ELA, under which CLC has filed its suit, provides that:

> A person may bring an environmental legal action against a person who caused or contributed to the release of a hazardous substance or petroleum into the surface or subsurface soil or groundwater that poses a risk to human health and the environment to recover reasonable costs of a

[2] In this case, the claim accrued as of March 1994, when the soil quality assessment was completed.

> removal or remedial action involving the hazardous substances or petroleum.

Ind. Code § 13-30-9-2. The ELA, as we have previously noted, is silent as to the applicable statute of limitations. Therefore, we must look elsewhere to determine the applicable statute of limitations governing a cause of action under this law.

Which statute of limitations applies in interpreting a state statute is a question of state law. In exercising our diversity jurisdiction, we must attempt to "predict how the Indiana Supreme Court would answer this question if it were presented to it." United States v. Navistar Int'l Transp. Corp., 152 F.3d 702, 713 (7th Cir. 1998) (citing Konradi v. United States, 919 F.2d 1207, 1213 (7th Cir. 1990)). In choosing a statute of limitations, we keep in mind that the purpose of a statute of limitations is to encourage prompt presentation of claims. Havens v. Ritchey, 582 N.E.2d 792, 794 (Ind. 1991). When a statute does not specify a statute of limitations, as the ELA does not, the court must examine the nature of the underlying cause of action. Klineman, Rose & Wolf, P.C. v. North Am. Lab. Co., 656 N.E.2d 1206, 1207-08 (Ind Ct. App. 1995). "It is the substance of the cause of action . . . which determines the applicability of the statute of limitations." Id. at 1208. "It is both necessary and appropriate . . . for the trial court to rule on the legal nature or substance of a cause of action when the applicability of a statute of limitations to a cause of action is in issue." Cordial v. Grimm, 169 Ind. App. 58, 63 (Ind. Ct. App. 1976) (overruled on other grounds). If two statutes of limitations apply to the same conduct, the more specific one governs. Hemenway v. Peabody Coal Co., 159 F.3d 255, 264 (7th Cir. 1998) (citing N. Ind. Pub. Serv. Co. v. Fattore Constr. Co., 486 N.E.2d 633 (Ind. Ct. App. 1985)). Thus, when more than one statute of limitations could be applied to a particular

statute, state courts try to determine which of the two competing statutes of limitations more closely fits the situation at hand. Hemenway v. Peabody Coal Co., 159 F.3d 255, 264 (7th Cir. 1998).

1. CERCLA's Statute of Limitations Does Not Apply to the ELA.

ACF contends that the six-year statute of limitations under CERLCA ("CERCLA SOL") should be applied to the ELA, or, in the alternative, that the six-year property SOL[3] should be applied. CLC responds that because the ELA does not constitute a wholesale adoption of CERCLA, there is no basis for importing that federal provision into the ELA and the Court must instead examine the analogous state statutes of limitations. A review of the ELA's statutory history is helpful in resolving the first issue of whether to adopt CERCLA's SOL for claims arising under the ELA.

In 1976, Congress enacted the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972, to regulate *ongoing* hazardous waste disposal and handling.[4] In 1980, to shore up the perceived gap in protection under the RCRA for *inactive, abandoned* hazardous waste sites, Congress enacted CERCLA, 42 U.S.C. §§ 9601-9675. CERCLA regulates enumerated "hazardous wastes," but specifically excludes petroleum wastes from its ambit. 42 U.S.C. § 9601(14); see generally Wilshire Westwoood Assoc. v. Atlantic Richfield, 881 F.2d 801 (9th Cir. 1989); Pantry, Inc. v. Stop-N-Go Foods, Inc., 777 F. Supp. 713, 720 (S.D. Ind. 1991). In

[3] As stated above, what we refer to as "property SOL" arises under Ind. Code § 34-11-2-7.

[4] For a more complete discussion of CERCLA's historical development, See Thomas F. P. Sullivan, Environmental Law Handbook, (18th ed. 2005).

addition to CERCLA's recovery provision, 42 U.S.C. 9607 ("section 107"),[5] Congress in 1986, established (or more appropriately, ensured) a contribution provision, 42 U.S.C. 9613 ("section 113"). As a result, two distinct causes of action now exist under CERCLA:

> The first is a cause of action for *cost recovery*, which may be initiated by a party that has incurred costs in cleaning up a contaminated site . . . . The second is a cause of action for *contribution*, which may be initiated by a defendant in a CERCLA lawsuit or by a person at least partially responsible for contaminating the site.

Northstar Partners v. S&S Consultants, Inc., 2004 U.S. Dist. 7799 at *9 (S.D. Ind. Mar. 31, 2004) (emphasis in original) (interpreting 42 U.S.C. §§ 9607(a), 9613(f)(1)).

As noted previously, ACF contends that because the ELA is silent as to an applicable statute of limitations, the Court should apply the CERCLA section 107(a)'s six-year statute of limitations, because the Indiana General Assembly, in enacting the ELA, intended that it provide a state cause of action similar to CERCLA's cost recovery provision in section 107. Def.s'

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[5] CERCLA provides either a three or a six-year statute of limitation, depending on the type of action and the nature of the cleanup activities performed at the site. The statute of limitations for a section 107 action under CERCLA is set forth in 42 U.S.C. § 9613(g)(2)(B), which provides that an action must be brought:

> for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

42 U.S.C. § 9613(g)(2)(B). Thus, ACF argues, under the CERCLA statute of limitations, any action by CLC against ACF should have been brought within six years after the initiation of physical on-site construction, which occurred by September of 1994, when Plaintiff began removing the contaminated soil from the Bunker C vault area.

Mem. in Supp. at 9-10 (citing Northstar Partners v. S&S Consultants, Inc., 2004 U.S. Dist. LEXIS 7799 at *23 (S.D. Ind. Mar. 31, 2004) (C.J. McKinney)). CLC responds that the Indiana Supreme Court would not adopt CERCLA section 107(a)'s statute of limitations because the ELA was not intended to be a wholesale adoption of CERCLA section 107 and that ACF's reliance on Northstar's holding to the effect that the ELA resembles CERCLA section 107 is mere dicta. Pl.'s Resp. at 15-17.

We are not persuaded that the ELA creates an inference that CERCLA's statute of limitations applies in a case such as this for two reasons. First, the ELA does not adopt or closely mimic CERCLA in any "wholesale" fashion; it was enacted simply "to provide a supplemental state law cause of action closely resembling the cost recovery provision [in CERCLA § 107]." Northstar, 2004 U.S. Dist. LEXIS 7799 at *23 (applying United States v. Navistar Int'l Transp. Corp., 152 F.3d 702, 714 (7th Cir. 1998) (holding that Ind. Code § 13-25-4-8, an Indiana environmental law unrelated to this case, required "the wholesale adoption of federal CERCLA law [in order] to effectuate [§ 13-25-4-8] as it is written.").) Our review of the ELA uncovers no explicit reference to CERCLA as would likely otherwise appear in its text or legislative history if it were a whole-sale adoption statute, similar to that referenced in Navistar. Ind. Code § 13-25-4-8. Second, cases decided by Indiana courts after Navistar, namely Bourbon Mini-Mart and McFarland (discussed infra), illustrate that, when an environmental clean up statute is silent regarding its statute of limitations, Indiana courts look first to state statutes of limitations, rather than turning to federal statutes, such as CERCLA.

Our analysis in this regard is not inconsistent with the holding in Northstar. In Northstar, plaintiff brought a cost recovery action under both CERCLA § 107(a) and the ELA in

connection with the cleanup of a hazardous substance. Id. at *3-4. The court granted defendant's motion to dismiss the CERCLA and ELA claims on grounds not relevant to the case at bar. However, in dicta, the court stated:

> If the Court were to interpret [the ELA] as analogous to a cause of action for contribution under CERCLA, then, because [the ELA] is silent with respect to the appropriate limitations period, the statute of limitations governing the CERCLA contribution provision would apply.

Northstar, 2004 U.S. Dist. LEXIS 7799 at *24 (emphasis added).[6]

We agree with CLC that the discussion in Northstar was mere dicta – a judicial finger in the wind – because the Court had already decided that plaintiff could not sue for contribution under the ELA because the ELA does not provide a contribution provision. 2004 U.S. Dist. LEXIS 7799 at *23.[7] Based on the statutory provisions and precedent, we cannot conclude that a cause of action under the ELA is sufficiently analogous to a cause of action under CERCLA, and thus we decline to adopt CERCLA's statute of limitations as applicable to the ELA. Accordingly, we turn our analysis to the applicable state statutes.

2. *The Six-Year State Statute of Limitations Applies to the ELA.*

The parties advance two separate state statutes of limitations as suitable for grafting onto

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[6] We interpret this excerpt as clear evidence that the court in Northstar did not reach the question of whehter claims under the ELA are analogous to a cause of action under CERCLA. In fact, CERCLA itself specifically excludes compensation for cleanup expenses in connection with petroleum contamination, while this appears to be a focal purpose of the ELA. Pl.'s Resp. at 16.

[7] Additionally, Northstar qualifies its dicta, saying: "If the Court were willing, as it is not, to interpret [ELA] as analogous to a cause of action for contribution under CERCLA." Northstar, 2004 U.S. Dist. LEXIS 7799 at *23 (emphasis added).

the ELA: CLC proposes the ten-year period, citing Ind. Code § 34-11-1-2(a) ("general SOL"); ACF advocates the six-year period based on Ind. Code § 34-11-2-7(3) ("property SOL"). The ten-year general SOL is aptly described as a "catch-all" statute of limitations because "it does not apply whenever a different limitation is prescribed by statute" and does not enumerate specific causes of action to which it applies. Ind. Code § 34-11-1-2(c). The six-year property SOL is more specific, applying to "[a]ctions for injuries to property other than personal property." Ind. Code § 34-11-2-7(3).

The complaint alleges that ACF caused or contributed to the release of petroleum on the property, (Compl. ¶ 17), and seeks to recover "all reasonable costs . . . incurred and to be incurred by CLC in responding to the release of petroleum at the Property." (Compl. ¶ 21.) ACF rejoins that CLC "seeks past and future costs incurred to remedy damage at its own property, not contribution for costs incurred in remedying contamination at the property of another"; thus CLC's claims fit squarely within the six-year property SOL. Def.'s Mem. in Supp. at 9 (quoting Comm'r, Ind. Dep't of Envtl. Mgmt. v. Bourbon Mini-Mart, Inc., 741 N.E.2d 361, 371-72 (Ind. Ct. App. 2000) (transfer granted));[8] McFarland Foods Corp. v. Chevron USA, Inc., No. IP 99-1489-C H/G, 2001 U.S. Dist. LEXIS 2679, at *17 (S.D. Ind. 2001); Pl.'s Mem. Opp. at 8.

Indiana courts traditionally have used the property SOL and its statutory progenitors, Ind. Code § 34-1-2-1 and Ind. Stat. § 294, for suits dealing with damages to land.[9] For example, in

[8] This case was affirmed in part, superseded in part (on different grounds), and remanded in Sub nom. Bourbon Mini-Mart, Inc. v. Gast Fuel & Servs., 783 N.E.2d 253 (Ind. 2003).

[9] See, e.g., Heath v. Walmart Stores, Inc., 113 F. Supp. 2d 1294, 1299 (S.D. Ind. 2000) (using property SOL for damages to land incurred when materials discarded during defendant's

Monsanto Co. v. Miller, a case factually similar to the matter before us, the Indiana Court of Appeals applied § 34-1-2-1, in holding that construction of a silo utilizing toxic materials constituted an injury to real property. 455 N.E.2d 392, 394 (Ind. Ct. App. 1983). Similarly, CLC contends that ACF caused or contributed to the release of petroleum on the property through its construction and use of vaults and pipelines which contained and transported and ultimately leaked Bunker C oil throughout the property. CLC seeks to recover the costs it incurred in responding to the damage caused by the release of this petroleum to the property, which claim, in our view, falls squarely within the property SOL of six years. In addition, the property SOL is the more specific statute applicable to this conduct. Accordingly, the six-year property limitations period applies to CLC's claims and we so hold.

CLC argues, unpersuasively, that instead of the property SOL, the general "catch-all" statute of limitations ("general SOL"), Ind. Code § 34-11-1-2, applies, since that statute of limitations has previously been applied to the Indiana Underground Storage Tank laws ("UST"),[10] and that the ELA is most analogous to the UST. See Comm'r, Indiana Dep't of

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construction caused plaintiff's property to flood); Milestone Constr., L.P. v. Ind. Bell Tel. Co., 739 N.E.2d 174 (Ind. Ct. App. 2000) (using property SOL for damages to underground cables which fell under "other than personal property"); Seigmund v. Tyner, 52 Ind. App. 581 (Ind. Ct. App. 1913) (using property SOL for damages to land due to water overflow); S. Ind. Ry. Co. v. Brown, 30 Ind. App. 684 (Ind Ct. App. 1903) (using property SOL predecessor for damages to land because of railroad).

[10] The relevant portion of UST, Ind. Code § 13-23-13-8(b), provides:

> (b) A person who:
>
> (1) pays to the state the costs described under subsection (a); or
>
> (2) undertakes corrective action resulting from a release from an underground storage tank, regardless of whether the corrective action is undertaken voluntarily or under an order issued under this

Envtl. Mgmt. v. Bourbon Mini-Mart, Inc., 741 N.E.2d 361, 371 (Ind. Ct. App. 2000) (transfer granted).

The UST was enacted by the Indiana General Assembly in 1987 to curtail and remedy underground storage tank pollution. Shell Oil Co. v. Meyer, 705 N.E.2d 962 (Ind. 1998); Pantry, 777 F. Supp. at 720. The UST excluded from coverage tanks which stored heating oil for consumption on the premises where the tank is stored. See Ind. Code §13-11-2-241(b)(2). CLC's suit under the ELA does not invoke this exclusion. And, there are clear similarities between the ELA and the UST: the UST, like the ELA, omitted any reference to a statute of limitations; and, in applying the UST's provisions, courts, including this court, have viewed the UST as "complementary" to the ELA.[11]

That the UST and ELA have been viewed as complementary might suggest that we also should apply the general SOL to the ELA, as other courts have applied it to the UST. Yet, Indiana case law reveals that, despite the similarities between the UST and ELA, they are fundamentally different in that the UST includes a contribution provision, whereas the ELA

> chapter, IC 13-23-14-1, IC 13-7-20-19 (before its repeal), or IC 13-7-20-26 (before its repeal);
>
> is entitled to receive a contribution from a person who owned or operated the underground storage tank at the time the release occurred. A person who brings a successful action to receive a contribution from an owner or operator is also entitled to receive reasonable attorney's fees and court costs from the owner or operator. An action brought under this subsection may be brought in a circuit or superior court. In resolving a contribution claim, a court may allocate the cost of a corrective action among the parties to the action using equitable factors that the court determines are appropriate.

[11] Entry Denying ACF's Motion to Dismiss [Docket No. 24].

provides only for recovery. Contribution provisions sound in indemnity and thus, as previous courts have recognized, do not fit in within the property SOL. See Bourbon Mini-Mart, 741 N.E.2d 361. CLC's complaint, which seeks recovery for damages to its property and not contribution, is thus more appropriately associated with the property SOL. In Bourbon Mini-Mart, the general SOL (§ 34-11-1-2) was applied, rather than the property SOL (§ 34-11-2-7) to the UST, because the plaintiffs were not "suing to recover damages to their own property, but instead to allocate liability for funds spent by IDEM [Indiana Department of Environmental Management;] thus [the suit] sounds in contribution or indemnity." Bourbon Mini-Mart, 741 N.E.2d at 371-72 (emphasis added).

However, CLC notes that a year after Bourbon Mini-Mart was decided, the court in McFarland dismissed the importance of any distinction between a claim based on recovery and one for contribution under the UST. The McFarland court noted the disjunctive "but instead," Id., reasoning that "[t]he fact that the claimants in Bourbon Mini-Mart had made payments to reimburse IDEM for its corrective efforts rather than undertaking such efforts on their own offers no sound distinction from this case." McFarland, 2001 U.S. Dist. LEXIS 2679, at *17.

The McFarland court relied heavily on the holding in Shell Oil Co. v. Meyer, 705 N.E.2d 962 (Ind. 1998), an Indiana Supreme Court case decided three years earlier, in ruling that whether the claimants made payments to reimburse IDEM for its efforts rather than conducting the clean up on their own was irrelevant. Specifically, in Shell, the court wrote:

> We agree with the Oil Companies that the current statute is somewhat internally inconsistent in retaining "contribution" to describe the remedy available after the group entitled to seek a remedy was expanded to include those who are not liable under the Act. However, the Legislature's very obvious affirmative change of language to permit recovery by "a person," demonstrates a clear

> purpose of the General Assembly to make this remedy available to anyone who initiates a corrective action.

Shell Oil Co. v. Meyer, 705 N.E.2d 962, 970 (Ind. 1998); Pl.'s Resp. Br. at 8. In Shell, the Indiana Supreme Court inferred from the UST's legislative history a clear intention that suits under that statute are contribution actions, including those which historically would not have been characterized as such prior to the enactment of the UST amendment. As contribution actions, UST claims are covered by the ten-year general SOL.

Unlike the plaintiffs in Bourbon Mini-Mart, McFarland, and Shell, who brought contribution actions under the UST, CLC, as plaintiff in the case at bar, seeks a cost-recovery action under the ELA, and, in any event, the ELA does not authorize a contribution remedy. Northstar Partners v. S&S Consultants, Inc., 2004 U.S. Dist. LEXIS 7799, *22 (S.D. Ind. 2004). Despite the similarity between the ELA and the UST – namely, that both allow a private, non-responsible party to recover costs incurred during voluntary remediation – the two statutes provide different remedies: the ELA allows recovery actions, while the UST authorizes contribution actions. Applying the holdings in Shell and McFarland, private non-responsible parties who sue under the UST to recover costs incurred during voluntary remediation seeking contribution remedies are covered by the general SOL, § 34-11-1-2. The ELA, in contrast, proportions costs based on the extent of contamination responsibility. See Ind. Code § 13-30-9-3(a) ("In resolving an environmental legal action, a court shall allocate the costs . . . without regard to any theory of joint and several liability."). The fact that the ELA does not provide for contribution forecloses a determination that the general SOL applies to the ELA. Although the

ELA and the UST are otherwise "complementary,"[12] their statutes of limitations are different. The six-year property SOL more closely reflects the substance of a cause of action under the ELA and is more specific than the general SOL, given the nature of an ELA cause of action. Thus, we hold that the property SOL applies to the ELA.

B. The Statute of Limitations Accrues Pursuant to the Discovery Rule.

The ELA and the property SOL do not specify the time when the limitations period "accrues," that is, when it begins to run. Determining when a statute of limitations accrues is also a question of law for the court to determine. Malachowski v. Bank One, Indianapolis, 590 N.E.2d 559, 564 (Ind. 1992).

ACF contends that Indiana's discovery rule applies here, requiring a finding that "[w]hatever claims the Plaintiff has against ACF began to run, at latest, in 1994 when it discovered and began remediation of the contamination. . . ." Def.'s Mem. in Supp. at 7 (citing Doe v. United Methodist Church, 673 N.E.2d 839, 842 (Ind. Ct. App. 1996)). ACF argues that CLC could have availed itself of a host of statutory and common law remedies against ACF over the years but inexplicably failed to do so; indeed, CLC had more than two years to file suit after the February 27, 1998, enactment of the ELA, and prior to March 2000, when the six years time period would have expired based on the 1994 discovery of CLC's cause of action. Indiana courts have found more insignificant and understandable delays insufficient to save a claim. Def.'s Mem. in Supp. at 7 (citing Boggs v. Tri-State Radiology, 730 N.E.2d 692, 694 (Ind.

[12] This is consistent with one of the chief differences between the UST and the ELA: the ELA, in contrast to CERCLA, RCRA, and the UST, expressly rejects joint and several liability for the parties. See Rumpke of Ind. v. Cummins Engine Co., 107 F.3d 1235, 1240 (7th Cir. 1997); Waste, Inc. Cost Recovery Group v. Allis Chalmers Corp., 51 F. Supp. 2d 936, 941 (N.D. Ind. 1999); Ind. Code § 13-23-13-8(b).

2000)).

CLC argues that "the [statute of] limitations period ordinarily does not begin to run until the plaintiff has a 'complete and present' cause of action." Pl.'s Resp. Br. in Opp. at 11 (quoting Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. Of Cal., Inc., 522 U.S. 192, 201 (1997)). Thus, CLC's argument continues, the statute of limitations did not commence until February 27, 1998, which was the effective date of the ELA. Pl.'s Mem. in Opp. at 10-12. CLC maintains that, in the absence of a legal consequence to a particular act, the act is not tortious and the injury not legally cognizable; thus there can be no "complete and present" cause of action.

Under Indiana law, the discovery rule is applied to torts and all actions covered by the property SOL. Meisenhelder v. Zipp Express, Inc., 788 N.E.2d 924, 928 (Ind. Ct. App. 2003); Habig v. Bruning, 613 N.E.2d 61 (Ind. Ct. App. 1993). Under the discovery rule, a cause of action accrues when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another. See New Welton Homes v. Eckman, 830 N.E.2d 32, 35 (Ind. 2005); Doe v. United Methodist Church, 673 N.E.2d 839, 842 (Ind. Ct. App. 2003); McFarland Foods Corp. v. Chevron USA, Inc., 2001 U.S. Dist. 2679 at *8 (S.D. Ind. 2001); Wehling v. Citizens Nat'l Bank, 586 N.E.2d 840, 843 (Ind. 1992). Thus, we must apply the discovery rule to determine when this cause of action accrued, and, in turn, to evaluate whether CLC's complaint is time-barred.

In enacting the ELA, the General Assembly expressed its intent that it be applied retroactively. Commercial Logistics Corp. v. ACF Indus. Inc., 2004 U.S. Dist. 23140 (S.D. Ind. Nov. 10, 2004). Retroactive application means that the statute or amendment is applicable to a

cause of action existing before or after the change in law. Herrick v. Sayler (7th Cir. 1957), 245 F.2d 171, 174 (on petition for r'hng); McGill v. Muddy Fork of Silver Creek Watershed Conservancy Dist., 370 N.E.2d 365, 370 (Ind. App. 1977). Thus, when a newly-enacted, retroactively-applied statute, such as the ELA, covers an injury which was discovered prior to enactment, the statute applies to the right of action when it arose, even if the date is before the change in law. Stated otherwise, the ELA, applied retroactively, means that the statute is to be applied as if it always existed, including at the time the injury occurred. The statute of limitations accrues at the time a cause of action arose, which, in this case, was the date when CLC received the environmental report documenting the fact of contamination,[13] to wit, in March, 1994.

After CLC discovered the contamination of its property in March 1994, it waited virtually ten years, until February, 27, 2004, to file its complaint against ACF under the ELA. In doing so, CLC was four years late. CLC's complaint against ACF should have been filed in March, 2000, in order to comply with the six-year property SOL, Ind. Code § 34-11-2-7. CLC had two years to file suit after the enactment of the ELA and its February 28, 1998, effective date.

Conclusion

For the reasons outlined above, in bringing this litigation, Plaintiff's claim was untimely, and Defendant's Motion for Summary Judgment is hereby GRANTED.

[13] Our independent research uncovered no cases to support CLC's reasoning, and the line of Antiterrorism and Effective Death Penalty Act ("AEDPA") cases cited by CLC deals with habeas relief, which, because of its highly unique application, we refuse to apply to a state-law environmental tort. See Newell v. Hanks, 283 F.3d 827 (7th Cir. 2002).

IT IS SO ORDERED.

Date: _____ _____

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